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COMPULSORY CONSTRUCTION OF NEW LINES OF RAILROAD

IN the half century of public regulation of railroads in the United States, regulatory legislation has dealt primarily with functions incident to the operation of existing enterprises. The basic concept has been that railroad corporations as common carriers have voluntarily assumed obligations to the public which the public has a right to require to be performed.

In the beginning the public offered inducements to private capital to construct railroads in order that undeveloped portions of the country might be given transportation facilities. The political and economic conditions were such as to make it impracticable to provide railroad transportation in any other way. Railroad property in the United States is private property devoted to a public use, and, except as the superior rights of the public in respect to the use are manifested, the usual incidents of private property continued during the period when the greatest amount of railroad mileage was constructed. No one conceived that the public had a right to require the construction of new lines of railroad by private capital.

When, however, private capital had been induced, or had elected, to engage itself in enterprises of this public nature, both the state and national governments asserted a right to regulate. In general, the regulation by the states has been in the exercise of their police power, and regulation by the federal government has been a manifestation of the national power to regulate interstate commerce.[1]

[1] The federal government may also regulate under the war power or under the power to establish post offices and post roads. See 20 COLUM. L. REV. 660. A discussion of these powers is not germane to the present inquiry.

The comprehensive schemes of public regulation of railroad corporations which have been set up by both the state and federal governments were in essence designed to procure the proper performance of undertakings which, as common carriers, these corporations were held to have assumed, dealing always with these common carrier corporations as existing and operating enterprises.

In one phase of the Transportation Act, 1920, we find a new concept of the rights of the public in respect to railroad corporations. We find an assertion by Congress of a power to require these corporations to make capital expenditures for the construction of new lines of railroad. This is the provision of the act which authorizes the Interstate Commerce Commission to order railroad companies to extend their lines of railroad.[2]

This assertion of power is in the broadest possible terms. The statute is not limited to extensions of a few miles, or within a specified territory, but under its terms there is no limit to a requirement that a railroad of the middle west should extend its lines to either the Pacific or Atlantic coasts, or to the Gulf of Mexico, except that the extension must be found by the Interstate Commerce Commission to be in the interest of public convenience and necessity, and also that the railroad company's ability to "perform its duty to the public" will not be impaired.

If this assertion of power is sustained, it is of the utmost impor-

[2] Paragraph 21, Section 402, Transportation Act, 1920 (same paragraph, section one, Interstate Commerce Act), provides:

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in the pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

tance. That the Interstate Commerce Commission will be called upon to exercise such power as it may have, now that Congress has undertaken to make the delegation, is reasonably certain. At all times throughout the development of railroad transportation in this country the demands of individuals and localities for new railroad construction to satisfy local conditions and desires have been insistent. Where local enterprises have failed to attract capital of the larger railroads to projects presented by local promoters, smaller corporations have been organized in many cases to undertake the construction. The large number of existing short line railroads illustrates this. If the Interstate Commerce Commission is now possessed of power to require these larger companies to construct new lines, it is to be expected that this type of local enterprise will turn to the Commission with its demand for satisfaction of local desire by proceedings under the new statute.

If the power be generally exercised, it would seem to be the most drastic encroachment thus far made by common carrier regulation in the United States upon the right of management of railroad corporations and upon the property rights of both the corporations and the stockholders. Regardless of the desirability from an economic standpoint of new railroad construction in undeveloped portions of the country, it must be conceded that the assertion by government of power to direct the form and manner of investment of private capital is an entirely new concept of public right in respect to private property. For the government at public expense to undertake to provide public conveniences is one thing; for the government to require construction of new enterprises by private capital is another.

Heretofore our theory of public regulation of common carriers has concerned itself with the obligations which these corporations have held themselves out as undertaking to perform. For lucidity of statement and clarity of expression, Mr. Justice Hughes' exposition of this doctrine in *Northern Pacific Railroad Company* v. *North Dakota*[3] cannot be surpassed:

> "The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the

[3] 236 U. S. 585, at 595.

obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they are granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state within the limits of its jurisdiction may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.

"But broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

Capital expenditures have been required by the public, and the requirements upheld by the courts, where they were in the nature of police regulations designed to secure adequacy of the service which the carrier had undertaken. Also, the railroad corporations, as all other citizens, have been held to be subject to the police power of the states and the general legislative power of the nation in so far as the same might be exercised to promote the health, safety,

and morals of the people. The speed of trains has been regulated;[4] electric headlights required,[5] and improved modes of heating passenger cars provided.[6] So, too, regulations have been upheld which have required the abolition of particular grade crossings;[7] the construction of new bridges to permit the proper flowage of water through natural water-courses made a part of public drainage projects,[8] and the employment of additional train men to promote safety of operation.[9] Railroad corporations serving particular localities have been required to construct and maintain side-tracks for the proper dispatch of business.[10] But where the requirement concerns matters as to which there has been no specific undertaking by the carrier, or where it does not affect the transportation services offered by the carrier, it has been held void, even though it might be of great convenience to the public. Thus, the state cannot require a railroad company to surrender portions of its right of way for the location of grain elevators;[11] neither can it order the indiscriminate construction of switches and side-tracks;[12] nor can it require the construction of track scales, convenient for the public, but not essential to the service of transportation offered by the company.[13]

Doctrines of the law of contracts have been applied in construing charter obligations with respect to railroad extensions between new termini. Where a railroad corporation has accepted a charter and franchise rights upon the proviso that it will operate a railroad between particular points, it may be required specifically to perform the covenant,[14] but if the charter of the company simply authorizes the railroad corporation, without requiring it, to construct and main-

[4] Erb v. Morasch, 177 U. S. 584.

[5] Atlantic Coast Line v. Georgia, 234 U. S. 280.

[6] N. Y., N. H. & H. R. R. Co. v. New York, 165 U. S. 628.

[7] N. Y. & N. E. R. Co. v. Town of Bristol, 151 U. S. 556.

[8] C., B. & Q. R. R. Co. v. Illinois, 200 U. S. 561.

[9] C., R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453.

[10] C. & N. W. Ry. Co. v. Ochs, 249 U. S. 416; Lake Erie & W. R. R. Co. v. Public Utilities Commission, 249 U. S. 422.

[11] Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403.

[12] Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196; Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510.

[13] Great Northern Ry. Co. v. Minnesota, 238 U. S. 340; Great Northern Ry. Co. v. Cahill, 253 U. S. 71.

[14] U. P. R. R. Co. v. Hall, 91 U. S. 343.

tain a railroad to a certain point, the corporation cannot be compelled to extend its rails to the charter limits.[15]

The police power of the states has been limited to a regulation of the railroad in the form in which the stockholders have created it. In applying for public franchises, either primary or secondary, the incorporators were frequently limited by specific requirements. Where the express or implied acceptance of these requirements created contractual obligations, the power of the state to enforce them is recognized. But the right of the public to regulate the functions of the corporation depended, at least in the beginning, upon the voluntary assumption by private capital of undertakings of a public nature.

It was recognized that this right of regulation could be asserted only within definite limits.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *Wisconsin*,[15a] where a state statute requiring the upper berth in sleeping cars to be closed when not in use was found unconstitutional, Mr. Justice Lamar stated the following limitation upon the power of regulation by the states: "The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation."

As previously noted, in the *North Dakota Lignite* case Mr. Justice Hughes limited the right of regulation through the police power to duties voluntarily undertaken, saying of a railroad corporation: "If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight."[16] More direct on the question of power in respect to railroad extensions is the following *dictum* in the *Oregon Track Connection* case, where Mr. Justice Lamar said: "Since the decision in *Wisconsin, etc., R. R.* v. *Jacobson*, 179 U. S. 287, there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a commission

[15] N. P. Ry. Co. v. Dustin, 142 U. S. 492-499; State v. Sou. Minn. Ry. Co., 18 Minn. 40.

[15a] 238 U. S. 491, at 501.

[16] 236 U. S. 585, at 595.

may compel them to build branch lines, so as to connect roads lying at a distance from each other."[17]

It is further well settled that the police power of the state cannot require private corporations to continue the operation of a railroad at a loss[18] unless such operation is a positive requirement of the charter or franchise under which the corporation continues to assert rights.[19] The public right over the corporation's property is limited by the use to which the property is devoted. The corporation possesses the power to change the use in order to avoid confiscation of its property. Thus, in the *Brooks-Scanlon* case, Mr. Justice Holmes for the court said: "If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss."[20]

If constitutional guaranties are violated by requiring continued railroad operation at a loss, it would seem that they would be violated by requiring new railroad construction without a definite, positive and enforceable guaranty of an adequate return.

In the only case which has been presented to the highest court of a state, the claim of existence of such a power has been denied.[21] The supreme court of California in the case referred to set aside an order of the Railroad Commission of that state which required the construction of a twelve-mile railroad extension, and stated the limits of the police power of the state as follows:

> "The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it shall engage in a new and additional enterprise, is one of policy to be determined by its directors. To compel a railroad company to apply its property to the con-

[17] 224 U. S. 510, at 528.

[18] Brooks-Scanlon Co. v. R. R. Comm., 251 U. S. 396; Bullock v. R. R. Comm. of Florida, 254 U. S. 513.

[19] Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 276.

[20] 251 U. S. 396, at 399.

[21] A., T. & S. F. Ry. Co. v. R. R. Comm., 173 Cal. 577, 160 Pac. 828.

> struction and operation of a line of railroad which it does not desire to construct or operate is to take its property."[22]

In arriving at this conclusion the supreme court of California discussed the asserted analogy between railroad operation and the operation of water and gas companies. As to the latter, requirements for extension of service have been upheld by the courts. The differentiation which the California court suggests seems to be sound; that is, that the local public utilities are operated under a monopolistic franchise and that in undertaking to exercise their franchise monopolies these companies are held to have undertaken to furnish adequate service within the territorial limits of their monopoly. As to them, it is held that a required extension does not constitute a taking of their property without due process of law. Clearly there is a distinction between the character of undertaking which private capital assumes when it secures a monopolistic franchise to serve a particular locality to the exclusion of all others, and the undertaking which private capital assumes in respect to the construction of a railroad as to which the clear intent of all laws, both state and federal, has been to preserve and foster competition.

It may be suggested in connection with a discussion of the police power of the state, as outlined by the supreme court of California, that statutes of the states and orders of regulatory bodies have been upheld where they have required the compulsory construction of side-tracks. A distinction exists, however, between the construction of a side-track, which is in effect the making adequate of terminal facilities in a particular place which a railroad company has undertaken to furnish, and the extension of a new line of railroad between points which the railroad company has not undertaken to serve.

While the decision of the California court is finally placed upon the interpretation of the particular statute involved, the discussion of constitutional power is in line with the previously recognized limitations upon the police power of the state. Nor does it appear probable that the courts would view any more favorably an effort to sustain orders for railroad extensions by reference to the so-called reserve power over corporate charters.

The reserve power of the states with respect to the amendment,

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[22] 173 Cal. 577; 160 Pac. 828, at 832.

alteration and repeal of corporate charters, which came into vogue following the decision of the Supreme Court of the United States in the *Dartmouth College* case,[23] is itself subject to the prohibition of the Fourteenth Amendment against taking property without due process of law.[24]

Further than this, it is has been held that not only is the state prevented from the taking of property without due process of law under the guise of amending a corporate charter, but that it cannot under this reservation of power prescribe amendments to existing charters which will change the nature of the corporation in such a way as to impair the rights of minority stockholders. Thus, where a legislature undertook by subsequent statute to authorize all railroad companies to lease their railroads, a lease of a railroad previously chartered was held void on the ground that the corporate business could not be radically changed by the majority, even with the consent of the legislature.[25] Under this principle that the state could not enact fundamental amendments without consent of the majority of the stockholders, it has been held that a state cannot authorize one railroad to consolidate with another,[26] or authorize a change in the nature of the enterprise,[27] a change of termini,[28] a change in the method of voting stock,[29] or a change of the route by a railroad company.[30]

If the states are impotent under their police power to require the building of new lines of railroad, no reason suggests itself for an assumption that the federal power under the commerce clause is broader in its application to the rights of private property. It has been decided that the prohibition against the taking of property without due process of law in the Fifth and Fourteenth amendments to the federal Constitution is to be construed in the same

[23] Dartmouth College v. Woodward, 4 Wheat. 518.

[24] Miller v. New York, 15 Wall. 478; Shields v. Ohio, 95 U. S. 319; Sinking Fund Cases, 99 U. S. 700; Greenwood v. Union Frt. Co., 105 U. S. 13.

[25] Mills v. R. R., 41 N. J. Eq. 1; Dow v. Nor. R. R., 67 N. H. 1.

[26] Clearwater v. Meredith, 1 Wallace 25.

[27] Black v. Canal Co., 24 N. J. Eq. 455.

[28] Manheim Co. v. Arndt, 31 Pa. St. 317.

[29] State v. Greer, 78 Mo. 188; Zabriskie v. Hackensack R. Co., 18 N. J. Eq. 178.

[30] Kenosha, etc., R. R. Co. v. Marsh, 17 Wis. 13.

manner in each amendment.[31] In this connection it is pertinent to observe the rather graphically stated concept of limitation upon the federal power which the Supreme Court of the United States, speaking through Mr. Justice Brewer, announced fourteen years ago: "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."[32]

This analysis of these powers of the state and federal agencies leads to the conclusion that as to neither does the right of the government under our constitutional scheme contemplate the requirement that private capital shall be invested in new enterprises of a public nature without the consent of its owners. But even if the courts should incline toward sustaining the exercise of the power to require new railroad construction at the expense of private capital, there is further question whether, even under such a view of the law, the present statute, wherein Congress has sought to exercise this right, could in any event constitute a valid exercise of power.

The present statute, set forth in full in a foot-note on an earlier page, provides that the Commission, after a hearing, may order any carrier by railroad "to extend its line or lines." The only limitations placed upon this broad delegation of power are: (a) that no such order be made unless the Commission finds the extension to be "reasonably required in the interest of public convenience and necessity," *or* (b) "that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

It will doubtless be urged by supporters of the validity of the statute that the disjunctive "or," making the limitations alternative, should be construed as "and." Thus construed, both types of limitation would be operative as conditions precedent to the exercise of power. Neither limitation, however, undertakes to protect the carrier corporation's rights in its own funds or property, or under-

[31] Twining v. New Jersey, 211 U. S. 78, at 101.

[32] Interstate Commerce Commission v. C. G. W. R. R. Co., 209 U. S. 108, at 118.

takes to offer any compensation for the "taking" which the statute contemplates.

That there is a "taking of property" when an additional line of railroad is ordered to be constructed can scarcely be controverted, for such an order requires the corporation to expend its capital in a particular way. It has been held by the Supreme Court that a requirement that a railroad company should make track connections,[33] or install track scales,[34] constituted a "taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid."[35]

It may be urged that whether or not the "taking" would be unreasonable or would deprive the corporation of a reasonable return upon investment would depend upon the facts in a particular case and the kind of order which the Commission might make. As a practical matter, however, there are few instances of a new railroad construction which can ever be assumed to be profitable from the beginning, and it is almost inconceivable that an order requiring new construction could ever be made under such circumstances that the Commission could find, or that the courts could sustain a finding, that the returns from operation would immediately be such as to make the venture a lucrative one from the standpoint of investment.

In this connection it is pertinent to observe that the principal demands for new lines of railroad are for lines of railroad wholly within the confines of a single state. As to such lines of railroad the Interstate Commerce Commission could scarcely undertake to make a competent finding as to the profitable nature of the undertaking, because Congress has left the rate-making power as to intrastate rates and fares in the hands of the states, except as unjust discrimination may result against interstate commerce. The great preponderance of local traffic on new lines of railroad is intrastate in character, and it is therefore an anomalous thing for the federal government to assert the right to require the building of new lines

[33] O. W. R. R. & N. Co. v. Fairchild, 224 U. S. 510.

[34] Great Northern Railway Co. v. Minnesota, 238 U. S. 340.

[35] 224 U. S. 510, at 523.

of railroad without at the same time asserting the power to control the entire income of such lines.

It is further doubtful what effect, if any, could be given to a finding by the Commission of probable future profit, in the light of the decision of the Supreme Court of the United States dealing with the construction of side-tracks to grain elevators in Nebraska, where the court declared a statute of Nebraska unconstitutional in that it did not provide compensation to the railroad company for its required outlay, and Mr. Justice Holmes for the court said: "To require the company to incur this expense unquestionably does take its property, whatever may be the speculation as to the ultimate return for the outlay."[36]

Another infirmity of the present statute is that it contemplates an order of the Commission requiring railroad construction upon property not owned by the carrier corporation, without clothing the corporation with any power of eminent domain whereby it might acquire the necessary right of way. Railroad corporations as chartered by the several states are generally given certain powers of condemnation within their charter limits by the state sovereignties. But the power of eminent domain granted by a state can be exercised only in conformity with the particular conditions of the grant and is not to be implied.[36a] None of these conditions now existing contemplates or authorizes the exercise by the carrier of the power of eminent domain to effectuate an order of the Interstate Commerce Commission. In fact, it has been held under particular statutes that the power of eminent domain granted by the state is exhausted when it has once been exercised in the original construction of a railroad, and that it cannot again be exercised without further statutory authority.[37]

The federal statute does not undertake to impose any legal duty upon the land owner to surrender his land for railroad right of way in the event that the Interstate Commerce Commission should order railroad construction across his premises. The railroad corporation

[36] Missouri Pacific Railway Co. v. Nebraska, 217 U. S. 196, 205.

[36a] Richmond v. Southern Bell T. & T. Co., 174 U. S. 761; Hooe v. United States, 218 U. S. 322.

[37] Cairo, V. & C. Ry. Co. v. Woodyard, 226 Ill. 331, 80 N. E. 882; C., B. & Q. R. R. Co. v. Cavanagh, 278 Ill. 609, 116 N. E. 128.

is given no federal right to force such a surrender. Thus an order of the Interstate Commerce Commission in a particular case might well be impossible of execution. In many cases it would be void not only as an interference with the property rights of the railroad corporation, but with the property rights of individual land owners —at least until Congress, by appropriate statutory enactment, should undertake to subject their property to the power of eminent domain.

The second alternative limitation in the statute to which we have referred—that is, that the Interstate Commerce Commission is not to make an order which will interfere with "the carrier's ability to perform its duty to the public,"—is so vague and indefinite as to add substantially nothing to the validity of the statute, unless it is susceptible of a construction which in effect would negative any possibility whatever of any order for the extension of a railroad being made. If it be said that the "duty to the public" to which the statute refers is the duty to improve and maintain existing lines of railroad, to purchase new equipment, and to enlarge present terminal facilities so as to promote the expeditious handling of business, then any order of the Commission which would require the use of property in any other way would "impair the ability of the carrier to perform its duty to the public." In this view of the law this proviso, as a practical matter, would nullify any order of the Commission acting under this statute. In any event, it cannot be urged that this limitation upon the Commission's authority serves to satisfy the requirements of the federal Constitution in respect to the taking and use of private property for a public use.

It may be asked, in the light of these criticisms and suggestions, what the legislative intent of Congress was in enacting the statute. The legislative history is not illuminating. In spite of the sweeping nature of the statute, the discussion in Congress, either on the floor or in the committee reports, is so meager as to indicate that but little consideration was given to this part of the law. The provision was originally in the bill as it passed the House of Representatives, and was incorporated in the final bill enacted into law by the conference committee of the House and the Senate. Even in the synopsis of the bill by paragraphs, as presented in the report of the Committee on Interstate and Foreign Commerce of the House of Representatives, the new declaration of power is given scant considera-

tion, the only sentence referring to it being the following: "The Commission is also given power, after hearing, to require a railroad to provide itself with safe and adequate facilities for performing its car service and to extend its line, if the Commission finds that this is required in the interest of public convenience and necessity and will not impair the ability of the carrier to perform its duty to the public."[38]

The probable reason for this scant consideration is that the provision seems to be adopted as a supposed concomitant to other paragraphs of the same section of the Transportation Act, contemporaneously enacted, which prohibited the building of extensions of new lines of railroad without first obtaining a certificate of present or future public convenience and necessity.

In paragraph 18 of section 402, Transportation Act, 1920, Congress undertook for the first time to restrict the building of new lines of railroad upon the theory, as expressed by the committee reports, that such restriction would tend to stabilize existing conditions and prevent the construction of unnecessary lines of railroad which, as stated by the committee of the House, "without any reasonable hope of profitable operation, would become a burden upon the public."[39]

[38] Report No. 456, House of Representatives, 66th Congress, First Session, page 28.

[39] The Committee on Interstate and Foreign Commerce of the House of Representatives presented its views upon this proviso of the law in its committee report as follows:

"Section 402 further provides that extensions of an existing railroad or the construction of a new line or the abandonment of a line shall not be premitted unless and until there shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction or abandonment. A like provision can be found in the statutes of a number of states. Your committee believes that the requirement of such a certificate, so far as extensions are concerned, will tend to stabilize existing conditions and prevent the construction of unnecessary or parallel lines which, without any reasonable hope of profitable operation, would become a burden to the public. A similar provision in the laws of several states has proved successful in preventing the construction of weak lines. This provision of the bill, however, does not extend to the construction or abandonment of side tracks, or of spur, industrial, team or switching tracks, or of street car and electric suburban lines, if such tracks or lines are located or are to be located wholly within one state."

It is to be recalled that in other sections of the Transportation Act Congress had directed the Commission to enact rates so as to provide a net return on the aggregate value of the property of carriers in groups upon such percentage as the Commission might determine to constitute a fair rate of return.[40]

Congress undertook to deal with the aggregate value of railroad property in groups to avoid the so-called "problems of the weak lines." It was urged that some lines of railroad should never have been built, in that they were unwisely located, were unnecessary in the interest of the general public, and represented a burden on the public for their continued maintenance without corresponding benefits.

Congress did not guarantee any particular railroad a rate of return, but dealt with the general level of rates in the expectation that this would result in adequate transportation for the public. The weak lines, which under no conceivable competitive rate structure could ever earn a fair rate of return on investment or value, presented a difficult problem. Quite naturally, Congress enacted the prohibition against the construction of more lines of railroad of this character until a national agency should have approved of the public convenience and necessity. Such restriction upon capital seeking to engage in ventures of a public nature has frequently been upheld when exercised by the states.[41]

But it is one thing to restrict private capital from investment in enterprise of a public nature, and quite another thing to require that capital should be so invested regardless of the desires of its owners. In the former case the state simply declines to permit the exercise of franchises of a quasi public character until certain conditions shall have been met. In the latter case the state quite effectively "takes" the property of a private corporation, interferes with the right of management, and negatives the contractual rights of stockholders in the corporate property.

[40] For the two years following the passage of the Act, Congress provided that the rate of return should be 5½ per cent, with an optional addition of one-half of one per cent for additions and betterments. Transportation Act, Section 422; Interstate Commerce Act, Section 15a.

[41] Milford, etc., R. R. Co. Petition, 68 N. H. 570, 36 Atl. 545; People v. R. R. Commission, 160 N. Y. 202, 54 N. E. 697; People v. Public Service Commission, 227 N. Y. 248, 125 N. E. 438.

Wholly aside from these legal aspects of the problem involved, and even more vital to the future of private railroad operation in this country, are the economic aspects. In the past the conduct of common carrier service by private capital has been entirely permissive. Regulations imposed have had to do with the protection of the public within the undertakings voluntarily assumed by private capital with the permission of the public. It has always been assumed that the only alternative to private undertaking was the performance of public service at public expense. It has been long supposed that until the government, state or federal, undertakes to provide public utility service at public expense, private property cannot be deprived of its right to a fair return upon capital invested in such enterprises or its right to withhold capital from such undertakings.

If, however, capital once invested in common carrier service is impressed with a public use, not only within the confines of original undertaking, but to a continued use in providing extensions of the enterprise under public direction, we have materially enlarged upon the original concept. From a practical standpoint, little good could result from such a view. Returns upon private capital invested in railroad properties have not been so satisfactory to the investors in recent years as to make them welcome new obligations not foreseen at the time of the original undertaking. If the concept of public right is to be enlarged we may well conceive that, in so far as possible, private capital will withdraw itself from the hazard of such undertakings. This unquestionably is not in the public interest as expressed in the more vital and constructive portions of the legislation recently enacted by Congress.

Neither of two decisions of the Supreme Court construing parts of the Transportation Act, rendered since the preparation of this article, bear materially upon the proposition which we have discussed. In *Railroad Commission of Wisconsin et al.* v. *C., B. & Q. R. R. Co.,* decided February 27, 1922, the court upheld orders of the Interstate Commerce Commission prescribing state-wide schedules of intrastate rates as a proper application of the provisions of paragraph 4, section 13, Interstate Commerce Act, in respect to removing discriminations against interstate commerce.

In *State of Texas* v. *Eastern Texas Railroad Company et al.*, decided March 13, 1922, the court held that the Transportation Act did not sustain the Interstate Commerce Commission in its authorization to the Eastern Texas Railroad Company, a Texas corporation, to abandon a part of its railroad as to intrastate business. Neither decision, therefore, touches upon the right of Congress to require capital expenditure for new undertakings.

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